



*Jeffry Brueggeman*  
General Attorney

SBC Communications Inc.  
1401 I Street, NW  
Suite 400  
Washington, D.C. 20005  
Phone 202-326-8911  
Fax 202-408-8745  
Email: jbruegg@corp.sbc.com

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**Via Electronic Filing**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
The Portals  
445 12 Street, S.W.  
Washington, D.C. 20554

**Re: Ex Parte Presentation — Review of Regulatory Requirements for  
Incumbent LEC Broadband Telecommunications Services  
CC Docket No. 01-337**

Dear Ms. Dortch:

In the above-referenced proceeding, the Commission is considering whether to eliminate dominant carrier regulations (*e.g.*, tariff and pricing requirements) that currently apply to incumbent local exchange carriers' (ILEC) provision of broadband telecommunications services. The purpose of this *ex parte* presentation is to address concerns raised by certain information service providers (ISPs) about the effect that broadband regulatory relief will have on ISP broadband access. SBC's experience operating as a non-dominant provider of broadband services for approximately 18 months shows that broadband deregulation will have a positive impact on ISPs, in addition to promoting broadband competition and deployment. In order to allay concerns of some ISPs, SBC is willing to make a number of voluntary commitments that will facilitate ISP broadband access during the interim period while the Commission completes its pending broadband proceedings.

Some ISPs have argued that dominant carrier regulation of ILEC broadband services is necessary to ensure that ISPs continue to have access to broadband services on reasonable terms and conditions.<sup>1</sup> The underlying premise of the ISPs' argument is that

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<sup>1</sup> See Letter from Jonathan Jacob Nadler, Counsel for Information Technology Association of America, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33 and 01-337 (October 17, 2002); Letter from Kenneth R. Boley, Attorney for Earthlink, Inc. to Marlene H. Dortch,

ILEC broadband services must continue to be regulated because the Commission has thus far decided not to impose any mandatory ISP access requirement on cable broadband services. This reasoning is fundamentally flawed for several reasons.

*First*, the Commission cannot ignore the intense competition in the broadband market and cable's dominant position in that market in deciding whether ILECs should be regulated as dominant providers of broadband services. The extensive competitive data that SBC submitted in its forbearance petition and in its comments in this proceeding is more than sufficient to satisfy the Commission's established standard for non-dominant classification. Indeed, the Commission itself has recognized the presence of intermodal broadband competition and cable's leadership position in the broadband market.<sup>2</sup>

*Second*, the Commission already determined in the *Cable Broadband Declaratory Ruling* that tariff regulation is not necessary to address ISP broadband access for the market leaders.<sup>3</sup> The Commission likewise must de-link the issue of ISP broadband access from tariff regulation of ILEC broadband services. It would be both arbitrary and unlawful for the Commission to conclude that ILEC broadband services must be tariffed because the Commission has left cable broadband services completely unregulated. Moreover, on a very practical level, it simply makes no sense to impose tariff regulation on broadband providers with 30% market share while leaving broadband providers serving almost 70% of the market unregulated. The resulting regulatory disparity prevents ILECs from competing effectively with dominant cable providers in the broadband market, which in turn deprives consumers of the full benefits of competition in the broadband market.

Even in the absence of a consistent ISP broadband access policy, dominant carrier regulation of ILEC broadband services is not necessary to ensure that ISPs obtain access to broadband services on commercially reasonable terms and conditions. SBC — by virtue of its experience operating as a non-dominant broadband service provider for 18 months — is in a unique position to respond to ISP concerns about broadband access in a de-tariffed environment. As discussed below in Section I, by any measure, SBC's wholesale DSL Transport business with unaffiliated ISPs grew significantly during the period in which it operated as a non-dominant provider. In addition, SBC continued to implement process and systems improvements that made it easier for ISPs to purchase and deploy SBC's wholesale DSL Transport services. SBC's experience as a non-dominant broadband service provider demonstrates that dominant carrier regulation is not essential to ensuring ISP broadband access.

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Secretary, FCC, CC Docket Nos. 02-33, 01-337, 01-338, 98-147, 98-10, 96-98, 95-20 (Sept. 9, 2002).

<sup>2</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 9 (2002) (*Cable Broadband Declaratory Ruling*).

<sup>3</sup> *Id.* ¶ 43.

Ultimately, the ISPs' concerns about broadband access must be addressed in the Commission's pending proceedings to consider whether, and to what extent, cable and wireline broadband services should be subject to a mandatory ISP access requirement. The Commission cannot wait to remove dominant carrier regulation of ILEC broadband services until the conclusion of those proceedings. During the interim period while the Commission completes the pending broadband proceedings, SBC is willing to provide assurances that ISPs will continue to have commercially reasonable access to its broadband services in a de-tariffed environment. SBC's voluntary commitments are discussed below in Section II.

## **I. SBC'S EXPERIENCE AS A NON-DOMINANT BROADBAND PROVIDER**

In its order approving the merger of SBC and Ameritech, the Commission concluded that if SBC complied with specified separations requirements and safeguards, its affiliate would not be able to acquire market power in the nascent market for Advanced Services.<sup>4</sup> Therefore, the Commission held that SBC's separate affiliate could operate as a non-dominant provider of Advanced Services.<sup>5</sup> In the early part of 2000, SBC began offering Advanced Services in its Service Area exclusively through its separate affiliate in accordance with the structural separation requirements established by the Commission in the *Merger Order*.<sup>6</sup> SBC operated as a non-dominant provider of Advanced Services for about 18 months.<sup>7</sup> Rather than filing dominant carrier tariffs with cost support showings, SBC entered into contracts with ISPs for wholesale DSL Transport service and other Advanced Services.

In the wake of the court's decision in *Association of Communications Enterprises v. FCC*,<sup>8</sup> however, the issue arose whether SBC's separate affiliate should be subject to dominant carrier regulation in its provision of broadband services. In order to avoid any potential for disputes related to its regulatory status, SBC voluntarily filed an interstate tariff in September 2001 for its provision of broadband services within SBC's in-region territory. At the same time, SBC asked the Commission to confirm that it is non-

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<sup>4</sup> *Application of Ameritech Corp. and SBC Communications, Inc for Consent to Transfer Control of Corporations Holding Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 458 n.834 (1999).

<sup>5</sup> *Id.*

<sup>6</sup> Ameritech formed a number of broadband services affiliates in 1992 that are now operated as part of SBC's broadband services affiliate, SBC Advanced Solutions, Inc. (SBC-ASI).

<sup>7</sup> As SBC received the necessary state approvals beginning in January 2000, it withdrew the federal tariff for broadband services in each region and began provisioning broadband services pursuant to contract. It took several months for SBC to complete this transition.

<sup>8</sup> *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

dominant in its provision of broadband services and to forbear from applying dominant carrier regulation, including tariff requirements, to SBC's provision of Broadband services.

Below, SBC discusses its experience operating in the market as a non-dominant broadband service provider.

**A. SBC's Wholesale DSL Transport Business with Unaffiliated ISPs Grew**

SBC experienced impressive growth in its wholesale DSL Transport business with unaffiliated ISPs during the period it operated as a non-dominant provider. For example:

- The total number of ISPs purchasing SBC's wholesale DSL Transport services increased from 361 in September 2000 to 404 in September 2001.
- The number of DSL Transport lines that SBC sold to unaffiliated ISPs increased from 75,523 in September 2000 to 194,999 in September 2001. The average monthly growth in DSL Transport lines sold to unaffiliated ISPs was 17.6% during this period.
- Unaffiliated ISPs became a larger portion of SBC's wholesale DSL Transport business during the period in which SBC operated as a non-dominant provider. In particular, unaffiliated ISPs represented 9.9% of SBC's wholesale DSL Transport business in December 2000 compared to 16.5% of its wholesale DSL Transport business in September 2001.

These statistics refute any notion that SBC would be intent on taking action to reduce its wholesale DSL Transport business with unaffiliated ISPs in a market environment in which it operates pursuant to contracts, rather than tariffs.

**B. SBC's Wholesale DSL Transport Prices Did Not Increase**

SBC did not increase its prices for wholesale DSL Transport service once it began operating as a non-dominant broadband service provider. To the contrary, SBC continued to introduce more favorable wholesale DSL Transport pricing plans for ISPs. The standard price for basic wholesale DSL Transport service (384 kbps to 1.5 Mbps) without any volume commitment was \$39 in SBC's interstate tariff as of January 2000. In January 2001, SBC introduced a \$35 price for basic wholesale DSL Transport service with no volume commitment. This pricing change allowed smaller ISPs to receive the same pricing level that previously had been available only to larger ISPs. Of course, SBC also grandfathered all existing ISP customers that were purchasing service out of volume and term plans in the tariff.

SBC's wholesale DSL Transport prices have continued to remain steady and even declined over time. In its September 2001 tariff filing, SBC retained the \$35 for basic

DSL Transport service for ISPs that made a relatively small volume commitment of 250 DSL Transport lines. SBC also grandfathered all existing contracts with non-affiliated ISP customers. SBC plans to introduce additional volume and term discount plans that will provide additional pricing options for its ISP customers.

### **C. SBC Implemented Numerous Systems and Process Improvements that Benefited Unaffiliated ISPs**

SBC has acknowledged that the transition to a completely separate data affiliate with its own employees, records and accounts was not an easy one. However, during the time period in which it operated as a non-dominant broadband provider, SBC addressed these problems and implemented numerous systems and process improvements that benefited unaffiliated ISPs. Thus, there is no basis to conclude that SBC and other ILECs will not treat ISPs as valued customers in a deregulated environment.

#### **1. Customer Contract Information**

In the absence of a tariff, SBC treated unaffiliated ISPs similar to the way it does business with those same ISPs now. SBC focused its business on the offering of wholesale DSL Transport service and actively encouraged unaffiliated ISPs to promote the DSL Transport product through marketing incentives and promotional considerations available to all similarly situated ISPs. The primary difference is that SBC was able to more effectively respond to the needs of ISPs by quickly implementing new pricing structures and promotional arrangements.

SBC took a number of specific steps that were designed to make it easier for ISPs to enter into contracts for wholesale DSL Transport services. As SBC withdrew its federal tariffs, it began publishing generally available terms and conditions by posting them on the SBC-ASI web site. SBC was ready and able to negotiate individual service agreements with ISPs that were based on these General Services Agreements (“GSA”). Over time, SBC introduced five variations of the wholesale DSL Transport GSA that were based on negotiations with ISPs and on the perceived needs of ISPs. ISPs had the flexibility to opt in to an existing GSA or to negotiate a new GSA in order to gain the benefit of new rates, terms and conditions. ISPs were notified of the new versions of the GSA through their SBC Account Manager, and the GSAs were available for inspection on the SBC website.

#### **2. Customer Management**

Since the inception of the DSL Transport product offering in 1998, SBC has valued unaffiliated ISPs as a distribution channel for its DSL Transport product. SBC has tailored DSL Transport offers to all types of ISPs, from small regional players to large national ISPs. Because SBC realizes that individual ISPs have diverse needs, SBC encouraged growth from incumbent and new ISPs to meet those needs. This view of the ISP market does not change simply because the service is treated as non-dominant.

In recognition of the need to focus on customer management at a time when the service was offered on a non-dominant basis, SBC established the Alliance Management Team in July 2000 to identify and resolve cross-regional issues affecting ISPs. The Alliance Management organization leads cross-disciplinary teams to resolve ISP issues with ordering, provisioning, maintenance, and CPE fulfillment.

### **3. Operations Support Systems**

During the time period in which SBC offered DSL Transport service as a non-dominant provider, based on input from unaffiliated and affiliated ISPs, SBC made dramatic improvements to the operations support systems and processes used to provide DSL Transport to unaffiliated ISPs. SBC established a series of applications, programs and tools to assist ISPs in accessing its systems and services. It has continued to develop programs that provide ease and convenience to ISPs. These programs include web-based access to DSL Transport provisioning and maintenance systems for order status and trouble report status, a DSL Transport batch maintenance report program and a trouble ticket status program.

SBC is planning to implement a number of significant enhancements to systems used by ISPs in 2003. In particular, SBC's Project North Star will standardize the pre-qualification and loop qualification process across the company. The result will be an ordering system that results in fewer qualification errors, fewer canceled orders and greater customer satisfaction. In addition, SBC will introduce XML interfaces for submitting orders, modifying existing orders and initiating change orders to existing DSL services. This enhancement will minimize the need for any ISP to maintain "back room" ordering centers. SBC also is planning to establish a CenterOps Gateway that will provide secure access to DSL test systems. ISPs will benefit from their ability to view conditions of the customer's DSL line on an end-to-end basis.

### **4. Installation and Repair Intervals**

During the time that SBC offered DSL Transport service as a non-dominant provider, installation and repair intervals decreased. For example:

- Installation intervals across SBC's entire service area decreased from an average of about 30 days in September 2000 to an average of about 9½ days in September 2001.
- Due dates met across SBC's entire service area increased from an average of about 77% in September 2000 to an average of more than 95% in September 2001.
- Repair intervals across SBC's entire service area decreased from an average of more than 2½ days in September 2000 to an average of less than 1½ days in September 2001.

More importantly, during the time that SBC offered wholesale DSL Transport service as a non-dominant provider, affiliated and unaffiliated ISPs received the same level of

service with respect to provisioning, installation, maintenance, and repair of the services needed to provide Internet access services.

Over the last several years (both pre-tariff and post-tariff), SBC has continued to improve the quality of service provided to all ISP customers. SBC has focused on customer service even though these areas are not addressed by the tariff. For example, SBC continues to improve its flow-through and processes in support of DSL Transport. As a result, SBC now has a standard due-date interval of 5 business days for new connects in the SBC-ASI West (Pacific Bell), North (AIT) and Central (Southwestern Bell) regions, and 6 business days in the SBC-ASI Northeast (SNET) regions.

In addition, SBC continues to work on improving the DSL Transport availability information received by ISPs. SBC has worked with ISPs over the past few years on “new” methods of retrieving DSL Transport availability information. For example, SBC implemented the Green Database, which allows ISPs to do pre-qualifications 24 hours a day, 7 days a week.

## **5. Billing and Collection**

During the time period in which SBC offered DSL service as a non-dominant provider, unaffiliated ISPs had the option to purchase billing and collection services from SBC on the same terms and conditions that such services were made available to affiliated ISPs.

## **II. SBC’S VOLUNTARY COMMITMENTS TO FACILITATE ISP BROADBAND ACCESS**

Based on its experience operating in the market as a non-dominant broadband service provider, SBC is willing to make a number of voluntary commitments that will facilitate ISP broadband access during the interim period while the Commission completes its pending proceedings to consider ISP broadband access issues. In effect, SBC is willing to make a firm commitment that it will continue the practices and procedures that it developed as a non-dominant broadband service provider. Specifically, SBC commits to the following practices if the Commission removes dominant carrier regulation of ILEC broadband services:

- SBC will post the terms and conditions of any broadband access arrangement that it has with an affiliated ISP.
- SBC will post general terms and conditions for ISP broadband access arrangements that unaffiliated ISPs can either opt in to or use as the starting point for negotiations.
- SBC will grandfather all existing volume and term plans for the remainder of their term and provide a 90-day transition period for month-to-month ISP customers. If an ISP does not negotiate a contract with SBC within the 90-day period, it will be automatically converted to a basic month-to-month GSA.

- SBC will continue to implement service and process improvements for its ISP customers, including modifications that are already planned for 2003 (e.g., CenterOps Gateway, XML interface for ordering and status checks).

These commitments fully address the unfounded concerns raised by some ISPs that non-dominant treatment of ILEC broadband services would negatively affect their ability to gain access to broadband services on commercially reasonable terms.

As further evidence of its commitment to doing business with unaffiliated ISPs, SBC has entered into a Memorandum of Understanding (MOU) with the United States Internet Industry Association that commits SBC to entering into commercial agreements for broadband Internet access with unaffiliated ISPs. In the MOU, SBC agrees to negotiate commercial agreements with ISPs for the provision of Internet services to end users, regardless of any regulatory requirement to do so. It also agrees to make information about business options available for review by ISPs when they are considering SBC as a business partner for the delivery of broadband Internet services to customers. The MOU provides a template for how SBC plans to conduct business with ISP customers in a deregulated environment. However, non-dominant classification of ILEC broadband services is required with or without SBC's assurances, particularly given to the significant deregulatory steps that the Commission has already taken with respect to dominant cable broadband services.

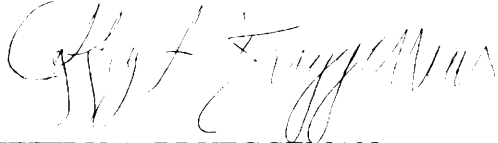
### **III. THE COMMISSION MUST ESTABLISH A UNIFORM ISP BROADBAND ACCESS POLICY FOR CABLE AND WIRELINE BROADBAND SERVICES**

SBC's voluntary commitments will address ISP concerns about broadband access during the interim period while the Commission addresses the issue of ISP access to cable and wireline broadband services in its pending rulemaking proceedings. The ultimate result of these proceedings must be a uniform ISP broadband access requirement that applies equally to both cable and wireline broadband services. Under no circumstances can the Commission conclude that the retention of ILEC broadband regulation or wireline ISP broadband access requirements is necessary to ensure ISP broadband access simply because the Commission has not yet decided whether dominant cable broadband providers should be subject to a mandatory ISP access requirement.

The Commission's decision whether to remove dominant carrier regulation of ILEC broadband services cannot be based on the need to ensure ISP broadband access. SBC believes intense competition in the broadband market provides sufficient market-based incentives for ISP broadband access arrangements. Further, the flexibility afforded by commercial arrangements will benefit both broadband service providers and ISPs. If, however, the Commission concludes that some type of mandatory ISP broadband access requirement is required, then such a requirement must apply consistently to cable and wireline broadband services. Clearly, any ISP broadband access requirement will not involve tariffs, given the Commission's prior determination in the *Cable Modem Declaratory Ruling*. Thus, the removal of dominant carrier regulation of ILEC

broadband services is a modest first step toward implementing a consistent ISP broadband access policy.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jeffery A. Brueggeman". The signature is fluid and cursive, with the first name "Jeffery" being more prominent than the last name "Brueggeman".

**JEFFERY A. BRUEGGEMAN**  
**GENERAL ATTORNEY**

cc: Jeff Carlisle  
Michelle Carey  
Brent Olson  
Jeremy Miller  
William Kehoe